

HOUSE BILL 1109

By Buck

AN ACT to amend Tennessee Code Annotated, Title 7,
Chapter 59 and Title 65, and to enact the
"Competitive Cable Services Act".

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 7, Chapter 59, is amended by adding Sections 2 through 13 of this act as a new, appropriately designated part.

SECTION 2. This part shall be known and may be cited as the "Competitive Cable Services Act".

SECTION 3. As used in this part, unless the context otherwise requires:

(1) "Cable service" means the one-way transmission to subscribers of video programming or other programming service and subscriber interaction, if any, which is required for the selection of such programming or other programming service. "Cable service" does not include any video programming provided by a commercial mobile service provider as defined in 47 U.S.C. § 332(d);

(2) "Cable service provider" means a cable operator as defined in 47 U.S.C. § 522(5);

(3) "Cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but "cable system" does not include:

(A) A facility that serves only to retransmit the television signals of one

(1) or more television broadcast stations;

(B) A facility that serves subscribers without using any public right-of-way;

(C) A facility of a common carrier that is subject, in whole or in part, to the provisions of 47 U.S.C. §§ 201 - 276, except that such facility shall be considered a cable system, other than for purposes of 47 U.S.C. § 541(c), to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services;

(D) An open video system that complies with 47 U.S.C. § 573; or

(E) Any facilities of any electric utility used solely for operating its electric utility system;

(4) "Franchise" means an initial authorization, or renewal of an authorization, issued by a franchising authority regardless of whether the authorization is designated as a franchise, permit, license, resolution, contract, ordinance, certificate agreement, or otherwise, that authorizes the construction or operation of a cable services network in the public rights-of-way;

(5) "Franchise authority" means any governmental entity empowered by federal, state, or local law to grant a franchise. With regard to the holder of a state-issued certificate of franchise authority within the areas covered by such certificate, the secretary of state is the sole franchising authority;

(6) "Gross revenues" means all revenues received from customers for providing cable services. "Gross revenues" shall not include:

(A) Any tax, surcharge, or governmental fee, including but not limited to, any franchise fee;

(B) Any revenue not actually received, even if billed, such as bad debt;

(C) Any revenue received by any affiliate or any other person in exchange for supplying goods or services to the cable service provider;

(D) Any amounts attributable to refunds, rebates, or discounts;

(E) Any revenue from services provided over the network that are not classified as cable services under 47 U.S.C. § 522, including without limitation revenue received from providing telecommunications services, information services, Internet access services, advertising services, and home-shopping services. Where the sale of any such non-cable service is bundled with the sale of one (1) or more cable services and sold for a single non-itemized price, “gross revenues” shall include only those revenues that are attributable to cable services based on the provider’s books and records;

(F) Any revenue attributable to late fees, returned check fees, or interest;

(G) Any revenue from the sale or rental of property, except such property the consumer is required to buy or rent exclusively from the cable service provider to receive cable service;

(H) Any revenues from inside wiring;

(I) Any revenue from sales for resale with respect to which the purchaser is required to pay a franchise fee, provided the purchaser certifies in writing that it will resell the service and pay a franchise fee with respect thereto; or

(J) Any revenue attributable to a reimbursement of costs including, but not limited to, the reimbursements by programmers of marketing costs incurred for the promotion or introduction of video programming;

(7) “Incumbent cable service provider” means the cable service provider serving the largest number of subscribers in a particular municipality or unincorporated area of a county on the effective date of this act;

(8) "Public right-of-way" means the area on, below, or above a public roadway, highway, street, public sidewalk, alley or waterway; and

(9) "Video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station, as set forth in 47 U.S.C. § 522(20).

SECTION 4.

(a) Any entity or person seeking to provide cable service over a cable system in this state after the effective date of this act shall file an application for a state franchise with the secretary of state as required by this section. An entity or person providing cable service on the effective date of this act under a franchise previously granted by a municipality or unincorporated county is not subject to, nor may it avail itself of, the statewide franchise provisions of this part with respect to such municipality or county until such franchise expires, except as provided by subsections (b) and (c).

(b) Beginning ninety (90) days following the effective date of this act, a cable service provider that is not the incumbent cable service provider and serves fewer than forty percent (40%) of the total cable service customers in a particular franchise area may elect to terminate that municipal franchise and seek a state-issued certificate of franchise authority by providing written notice to the secretary of state and the affected municipality or unincorporated county within one hundred and eighty (180) days of the effective date of this act. The municipal franchise is terminated on the date the secretary of state issues the state-issued certificate of franchise authority.

(c) A cable service provider that serves fewer than forty percent (40%) of the total cable customers in a franchise area and that elects under subsection (b) to terminate an existing franchise is responsible for remitting to the affected municipality or unincorporated county before ninety-one (91) days after the date the franchise is

terminated any accrued but unpaid franchise fees due under the terminated franchise. If the cable service provider has credit remaining from prepaid franchise fees, the provider may deduct the amount of the remaining credit from any future fees or taxes it must pay to the municipality or unincorporated county, either directly or through the comptroller.

(d) The secretary of state shall issue a certificate of franchise authority authorizing the applicant to offer cable service in this state within ten (10) days of receipt of an affidavit submitted by the applicant and signed by an officer or general partner of the applicant affirming the following:

(1) That the applicant agrees to comply with all applicable federal and state laws and regulations to the extent that such state laws and regulations are not in conflict with or superseded by the provisions of this act or other applicable state law;

(2) A description of the municipalities and unincorporated counties to be served, in whole or in part, by the applicant, which description shall be updated by the applicant prior to the provision of cable service to an area within a previously undesignated unincorporated county or municipality; and

(3) The location of the principal place of business and the names of the principal executive officers of the applicant.

(e) The certificate of franchise authority issued by the secretary of state shall contain the following:

(1) A nonexclusive grant of authority to provide cable service in the areas set forth in the application;

(2) A nonexclusive grant of authority to construct, maintain and operate facilities through, upon, over and under any public lands, rights-of-way or waters of this state; on, over and under the lands of any person in this state; and along,

upon and over the rights-of-way of any railroad or railway company in this state in the delivery of that service, subject to the laws of this state, including the lawful exercise of police powers by the municipalities and counties in which such service is delivered; and

(3) A statement that the grant of authority is subject to lawful operation of the cable service by the applicant or its successor in interest.

(f) The failure of the secretary of state to notify the applicant of the completeness of the applicant's affidavit or issue a certificate of state-issued franchise authority within ten (10) business days of receipt of a completed affidavit shall constitute issuance of the certificate applied for without further action on behalf of the applicant.

(g) The certificate of franchise authority issued by the secretary of state is fully transferable to any successor in interest by the applicant to which it is initially granted. A notice of transfer shall be promptly filed with the secretary of state within ten (10) days of the completion of such transfer. The secretary of state is neither required nor authorized to act upon the notice.

(h) The certificate of state franchise authority issued pursuant to this part may be terminated by the cable service provider by submitting written notice of such termination to the secretary of state. The secretary of state is neither required nor authorized to act upon the notice.

(i) The certificate of state franchise authority issued pursuant to this part supersedes and is in lieu of any franchise authority or approval required by state or local law as of the date of enactment of this part.

SECTION 5.

(a) Except as otherwise stated in Section 4, a cable service provider that currently has a franchise to provide cable service with respect to such municipalities or

counties is not eligible to seek a state-issued certificate of franchise authority under this part until the expiration date of the existing franchise agreement.

(b) For purposes of this part, a cable service provider will be deemed to have a franchise to provide cable service in a specific municipality or county if any predecessor entity of the cable service provider has a cable franchise agreement granted by that specific municipality or county.

(c) For purposes of this section, "predecessor entity" shall include, but not be limited to, any entity receiving, obtaining, or operating under a municipal or county cable franchise through merger, sale, assignment, restructuring, or any other type of transaction.

SECTION 6.

(a) The holder of a state-issued certificate of franchise authority may be required, pursuant to an ordinance or resolution duly adopted by any municipality or county, to pay a franchise fee equal to a specified percentage of such holder's gross revenues derived from customers located within the municipality or unincorporated areas of the county; provided, however, that such percentage, hereafter referred to as the "state-issued certificate holder's franchise fee rate," shall not exceed the lesser of the franchise fee rate imposed on an incumbent cable service provider by such municipality or county, if any, or five percent (5%). The ordinance or resolution imposing such franchise fee shall set forth the state-issued certificate holder's franchise fee rate. The municipality or county shall provide written notice of such information and a copy of the ordinance to the comptroller as a condition of receiving any franchise fee payments from the comptroller. As a condition precedent to a state-issued certificate holder's obligation to pay a franchise fee established or changed pursuant to this section, the comptroller shall provide to each state-issued certificate holder a copy of each rate change

notification at least forty-five (45) days in advance of the effective date of such rate change and a list of the franchise fee rates of all municipalities and counties on a quarterly basis.

(b) The aggregate amount of the franchise fees payable under this section shall be paid quarterly to the comptroller, within forty-five (45) days after the end of the quarter for the preceding calendar quarter. Each payment shall be accompanied by a statement showing, for the quarter covered by the payment:

(1) The state-issued certificate holder's gross revenues attributable to each municipality or unincorporated areas of the county that imposes a state-issued certificate holder's franchise fee;

(2) The applicable state-issued certificate holder's franchise fee rate for each such municipality or county; and

(3) The portion of the aggregate payment attributable to each such municipality or county. The comptroller shall distribute the appropriate amounts to the respective jurisdictions within sixty (60) days after the end of the quarter. Any supporting statements are confidential and are exempt from disclosure under any provision of state law.

(c) The comptroller may, upon reasonable written request but no more than once with respect to any given period, review or audit the business records of the cable service provider to the extent necessary to ensure payment in accordance with this section. In the event of a dispute concerning the amount of the franchise fee due to a municipality or county under this section, an action may be brought in a court of competent jurisdiction either by the comptroller, on behalf of one (1) or more municipalities or counties seeking to recover an additional amount alleged to be due, or by a state-issued certificate holder seeking a refund of an alleged overpayment;

provided, however, that any such action must be brought within three (3) years following the end of the quarter to which the disputed amount relates. This time period may be extended by written agreement between the state-issued certificate holder and the comptroller on behalf of all municipalities and unincorporated counties. Each party shall bear the party's own costs incurred in connection with any such examination or dispute. A person or entity may not solicit or accept compensation dependent in any manner upon the outcome of any such review or audit, including, without limitation, the review or audit findings or the recovery of fees by the comptroller, municipality or county.

(d) The holder of a state-issued certificate of franchise authority may designate that portion of a subscriber's bill attributable to any franchise fee imposed pursuant to this section as a separate item on the bill and recover such amount from the subscriber.

(e) No municipality or county shall levy any additional tax, license, fee, or other assessment on, with respect to, or measured by the gross revenues of a cable service provider, other than the franchise fee authorized by this section or a cable franchise fee incurred by a cable service provider prior to July 1, 2007. No municipality or county shall levy any tax, license, fee, or other assessment on a cable service provider or its customers, that is not generally imposed and applicable to a majority of all other businesses. This franchise fee is in lieu of any permit fee, encroachment fee, degradation fee or other fee that could otherwise be assessed on a state-issued certificate holder for the holder's occupation or work within the public rights-of-way. Nothing in this section shall restrict the right of any municipality or county to impose ad valorem taxes, sales taxes, or other taxes lawfully imposed on all other businesses within such municipality or county.

SECTION 7. No franchising authority, state agency or political subdivision of the state may impose any cable system construction or cable service deployment build-out requirements on a holder of a state-issued certificate of franchise authority.

SECTION 8. The holder of a state-issued certificate of franchise authority must comply with all applicable federal customer service requirements. Recognizing the increased choice customers will have with more providers, no state-specific service quality standards shall be imposed in addition to those federal standards. The department of commerce and insurance, division of consumer affairs shall receive service quality complaints from customers of the holder of a state-issued certificate of franchise authority. The division of consumer affairs may not enforce or seek the enforcement of any provisions of this section, but it may endeavor to bring about a voluntary resolution of any such complaint.

SECTION 9.

(a) No later than twelve (12) months after receipt of a written request by a municipality or county, the holder of a state-issued certificate of franchise authority shall designate a sufficient amount of capacity on its network to allow for the provision of public, educational, and governmental (PEG) access channels for noncommercial programming consistent with this section.

(b) The holder of a state-issued certificate of franchise authority shall designate a sufficient amount of capacity on its cable system to allow the provision of a comparable-number of PEG access channels that a municipality or county has activated under the incumbent cable service provider's franchise agreement as of the effective date of this act. For purposes of this section, a PEG channel is deemed activated if it is being utilized for PEG programming within the municipality or county for at least eight (8) contiguous hours of non-repeating content per day. If a municipality or county did not have PEG access channels under the incumbent cable provider's franchise agreement

as of such effective date, the cable service provider shall designate upon written request a sufficient amount of capacity on its cable system to support up to three (3) PEG channels for a municipality or unincorporated county with a population of fifty thousand (50,000) or more; and up to two (2) PEG channels for a municipality or unincorporated county with a population of less than fifty thousand (50,000).

(c) Any PEG channel capability provided pursuant to this section that is not utilized by the municipality or county for at least eight (8) contiguous hours of non-repeating content per day shall no longer be made available to the municipality or county, but may be programmed at the cable service provider's discretion. At such time as the municipality or county can certify to the cable service provider a schedule for at least eight (8) contiguous hours of non-repeating content per day, the cable service provider shall restore the previously lost channel but shall be under no obligation to carry that channel on a basic or analog tier.

(d) In the event a municipality or county has not utilized the maximum number of access channels as provided by subsection (b), access to the additional channel capacity allowed in subsection (b) shall be provided within one hundred twenty (120) days upon request only if the municipality or county can demonstrate that all activated PEG channels are "substantially utilized." PEG channels shall be considered "substantially utilized" when twelve (12) contiguous hours of non-repeating content are programmed on that channel each calendar day. In addition, at least seventy-five percent (75%) of the twelve (12) hours of programming for each business day on average over each calendar quarter must be non-repeat programming. Non-repeat programming shall include the first three (3) video-castings of a program.

(e) The operation of any PEG access channel provided pursuant to this section shall be the responsibility of the municipality, the county or the commission receiving the

benefit of such channel. The holder of a state-issued certificate of franchise authority bears only the responsibility for the transmission of such channel. The holder of a state-issued certificate of franchise authority shall be responsible for providing the connectivity to each PEG access channel distribution point up to the first two hundred feet (200').

(f) The municipality, the county or the commission must ensure that all transmissions of content and programming provided by or arranged by them to be transmitted over a PEG channel by a holder of a state-issued certificate of franchise authority are provided and submitted to the cable service provider in a manner or form that is capable of being accepted and transmitted by such provider over its cable system without further alteration or change in the content or transmission signal, and that is compatible with the technology or protocol utilized by the cable service provider to deliver its cable services. The provision of PEG content to the provider shall constitute authorization for the provider to carry such content including, at the provider's option, beyond the jurisdictional boundaries of the municipality or county.

(g) Where technically feasible, the incumbent cable service provider shall, upon receipt of a written request of a holder of a state-issued certificate, negotiate, in good faith, to interconnect its cable system with the cable system of such certificate holder on mutually acceptable and reasonable terms in order to enable such certificate holder to gain access to PEG programming. Interconnection may be accomplished by direct cable microwave link, satellite, or other reasonable method of connection.

(h) A holder of a state-issued certificate of franchise authority is not required to interconnect for, or otherwise transmit, PEG content that is branded with the logo, name, or other identifying marks of another cable service provider, and a municipality or county may require a cable service provider to remove its logo, name, or other identifying marks from PEG content that is to be made available to another provider.

SECTION 10. In addition to a municipality's and county's authority to exercise its nondiscriminatory police power with respect to public rights-of-way under current law, a municipality's or county's authority to regulate the holder of state-issued certificate of franchise authority is limited to:

(1) A requirement that the holder of a state-issued certificate of franchise authority who is providing cable service within the municipality or unincorporated county register with such municipality or county and maintain a point of contact; and

(2) The establishment of reasonable guidelines regarding the use of public, educational, and governmental access channels.

SECTION 11.

(a) A cable service provider that has been granted a state-issued certificate of franchise authority may not deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which such group resides.

(b) Any potential residential subscriber or group of residential subscribers who believes, that the subscriber or group is being denied access to services in violation of subsection (a) may file a complaint with the secretary of state, along with a clear statement of the facts and the information upon which the complainant is relying to support the complaint. Upon receipt of any such complaint, the secretary of state shall serve a copy of the complaint and supporting materials upon the subject cable service provider, who will have sixty (60) days after receipt of such information to submit a written answer and any other relevant information the provider wishes to submit to the secretary of state in response to the complaint. If, after further investigation of the allegations contained in the complaint, the secretary of state determines, based on the information submitted or gathered pursuant to such process, that a material violation of

subsection (a) has occurred, the secretary of state shall issue a written order setting forth the basis for such findings and giving the cable service provider a reasonable time to cure the violation.

(c) If the cable service provider subject to an order issued by the secretary of state pursuant to subsection (b) fails to cure the violation within a reasonable period of time, the secretary of state may file an enforcement action on behalf of the affected potential subscribers in any circuit court of this state or federal court of competent jurisdiction. A cable service provider that is found by the secretary of state to be in violation of subsection (a) may challenge that determination in the circuit courts of this state or in any federal court of competent jurisdiction.

SECTION 12. Should the holder of a state-issued certificate of franchise authority be found by a court of competent jurisdiction to be in noncompliance with the requirements of this part, the court may order the holder of the state-issued certificate of franchise authority, within a specified reasonable period of time, to cure such noncompliance.

SECTION 13. Nothing in this part shall impair the right of a provider of video programming that is not a cable service provider to provide video programming and use public rights-of-way to the extent otherwise permitted by law without a state-issued certificate of franchise authority.

SECTION 14. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 15. This act shall take effect July 1, 2007, the public welfare requiring it.